

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RODNEY A. TEDERMAN,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 2:14-CV-00132-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 12, 15. Attorney Jeffrey Schwab represents Rodney A. Tederman (Plaintiff); Special Assistant United States Attorney Jeffrey McClain represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 18.

After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on July 29, 2010, alleging disability since June 1, 2009, due to major depressive disorder, panic disorder with agoraphobia, difficulty breathing, and knee injuries. Tr. 285, 288. The applications were

1 denied initially and upon reconsideration. Tr. 169-176, 179-190. Administrative
2 Law Judge (ALJ) Palachuk held a hearing on November 7, 2012, Tr. 46-112, at
3 which Plaintiff, represented by counsel, vocational expert (VE) Daniel McKinney,
4 medical expert (ME) Anthony Francis, M.D., and ME Marian Martin, Ph.D.,
5 testified. The ALJ issued an unfavorable decision on November 29, 2012. Tr. 19-
6 33. The Appeals Council denied review on March 12, 2014. Tr. 1-6. The ALJ's
7 November 29, 2012, decision became the final decision of the Commissioner,
8 which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
9 filed this action for judicial review on May 7, 2014. ECF No. 1, 3.

10 **STATEMENT OF FACTS**

11 The facts of the case are set forth in the administrative hearing transcript, the
12 ALJ's decision, and the briefs of the parties. They are only briefly summarized
13 here.

14 Plaintiff was 39 years old at the alleged onset date, June 1, 2009. Tr. 264.
15 Plaintiff completed the ninth grade and has not received his GED. Tr. 87, 289. He
16 has worked as a rotary driller and stock controller. Tr. 305-307. Plaintiff reported
17 he stopped working in January of 2009 due to both his conditions and the lack of
18 work, but that his conditions alone became severe enough to keep him from
19 working as of June 1, 2009. Tr. 289. At the administrative hearing, Plaintiff
20 described depression, audio and visual hallucinations, anxiety around other people,
21 difficulty breathing, and bilateral knee pain, Tr. 94, 91, 97, 100, 103.

22 **STANDARD OF REVIEW**

23 The ALJ is responsible for determining credibility, resolving conflicts in
24 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
25 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
26 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
27 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
28 not supported by substantial evidence or if it is based on legal error. *Tackett v.*

1 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
 2 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
 3 another way, substantial evidence is such relevant evidence as a reasonable mind
 4 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
 5 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
 6 interpretation, the court may not substitute its judgment for that of the ALJ.
 7 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial
 8 evidence will still be set aside if the proper legal standards were not applied in
 9 weighing the evidence and making the decision. *Browner v. Secretary of Health*
 10 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence
 11 supports the administrative findings, or if conflicting evidence supports a finding
 12 of either disability or non-disability, the ALJ's determination is conclusive.
 13 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

14 **SEQUENTIAL EVALUATION PROCESS**

15 The Commissioner has established a five-step sequential evaluation process
 16 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
 17 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
 18 through four, the burden of proof rests upon claimants to establish a prima facie
 19 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
 20 burden is met once claimants establish that physical or mental impairments prevent
 21 them from engaging in their previous occupations. 20 C.F.R. §§ 404.1520(a)(4),
 22 416.920(a)(4). If claimants cannot do their past relevant work, the ALJ proceeds
 23 to step five, and the burden shifts to the Commissioner to show that (1) the
 24 claimants can make an adjustment to other work, and (2) specific jobs exist in the
 25 national economy which claimants can perform. *Batson v. Comm'r of Soc. Sec.*
 26 *Admin.*, 359 F.3d 1190, 1193-1194 (2004). If claimants cannot make an
 27 adjustment to other work in the national economy, a finding of "disabled" is made.
 28 20 C.F.R. §§ 404.1520(a)(v), 416.920(a)(4)(v).

ADMINISTRATIVE DECISION

On November 26, 2012, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act.

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since June 1, 2009, the alleged onset date of disability. Tr. 21.

At step two, the ALJ determined Plaintiff had the following severe impairments: osteoarthritis of the left knee; history of patellar dislocations with multiple surgeries of the left knee; history of left lower lobe lung resections; subjective weakness of the left shoulder; schizoaffective disorder; bipolar disorder vs. substance induced mood disorder; personality disorder not otherwise specified; and polysubstance abuse (cocaine, alcohol, and marijuana). Tr. 22.

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments. Tr. 25.

At step four, the ALJ assessed Plaintiff's residual function capacity (RFC) and determined he could perform a range of sedentary work with the following restrictions:

The claimant can occasionally lift or carry ten pounds, frequently lift or carry less than ten pounds, sit for approximately six hours in an eight-hour workday and walk or stand no more than two hours in an eight-hour workday. The claimant requires the freedom to alternate sitting and standing every 60 minutes. He is capable of occasionally crawling, crouching, kneeling, stooping, balancing and climbing ramps or stairs, but he is unable to climb ladders, ropes or scaffolds. The claimant should avoid concentrate[d] exposure to extreme temperatures, humidity and respiratory irritants and all exposure to hazards. He is able to understand, remember and carry out simple, routine, repetitive tasks and instructions. He is able to maintain attention and concentration for 2-hour intervals between regularly scheduled breaks. The claimant is unable to make work-related decisions or judgments.

1 He is unable to engage in production rate for pace of work. He is
2 able to tolerate only minimal (defined as less than 25% of the day)
3 interaction with the public, coworkers and supervisors. He
4 requires additional time (defined as 10% more than the average
employee) to adapt to changes in the work setting or work routine.

5 Tr. 26-27. The ALJ concluded that Plaintiff was not able to perform his past
6 relevant work. Tr. 31.

7 At step five, the ALJ determined that, considering Plaintiff's age, education,
8 work experience and RFC, and based on the testimony of the VE, there were other
9 jobs that exist in significant numbers in the national economy Plaintiff could
10 perform, including the occupations of production inspectors/checkers, packing and
11 filling machine operators, and hand packers and packagers. Tr. 32. The ALJ thus
12 concluded Plaintiff was not under a disability within the meaning of the Social
13 Security Act at any time from June 1, 2009, through the date of the ALJ's decision,
14 November 29, 2012. Tr. 33.

15 ISSUES

16 The question presented is whether substantial evidence supports the ALJ's
17 decision denying benefits and, if so, whether that decision is based on proper legal
18 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the
19 medical opinions of Terilee Wingate, Ph.D., Marion Martin, Ph.D., and Christmas
20 Covell, Ph.D.; (2) failing to properly consider Plaintiff's statements about the
21 severity of his symptoms, (3) failing to form a RFC determination that accounted
22 for all of his limitations; and (4) failing to fully develop the record.

23 DISCUSSION

24 A. Evaluation of Medical Opinions

25 Plaintiff argues the ALJ failed to properly consider and weigh the medical
26 opinions regarding Plaintiff's mental health impairments, specifically addressing
27 the opinions of Dr. Wingate, Dr. Martin, and Dr. Covell. ECF No. 12 at 4-6.

28 In weighing medical source opinions, the ALJ should distinguish between

1 three different types of physicians: (1) treating physicians, who actually treat the
 2 claimant; (2) examining physicians, who examine but do not treat the claimant;
 3 and; (3) nonexamining physicians who neither treat nor examine the claimant.
 4 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
 5 weight to the opinion of a treating physician than to the opinion of an examining
 6 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
 7 should give more weight to the opinion of an examining physician than to the
 8 opinion of a nonexamining physician. *Id.*

9 When a treating physician's opinion is not contradicted by another
 10 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
 11 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
 12 physician's opinion is contradicted by another physician, the ALJ is only required
 13 to provide "specific and legitimate reasons" for rejecting the opinion of the treating
 14 physician. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when
 15 an examining physician's opinion is not contradicted by another physician, the
 16 ALJ may reject the opinion only for "clear and convincing" reasons. *Lester*, 81
 17 F.2d at 830. When an examining physician's opinion is contradicted by another
 18 physician, the ALJ is only required to provide "specific and legitimate reasons" for
 19 rejecting the opinion of the examining physician. *Id.* at 830-831.

20 **1. Dr. Wingate**

21 Defendant asserts that Plaintiff failed to contest the weight the ALJ gave to
 22 Dr. Wingate's opinion. ECF No. 15 at 11. However, Plaintiff characterized the
 23 issue as "whether the mental RFC opined by Dr. Martin withstands scrutiny; and
 24 whether, in combination with his physical, educational, and skills limitations he
 25 can return to SGA level work activity." ECF No. 12 at 4. In attacking the weight
 26 given to Dr. Martin's opinion, Plaintiff asserts that Dr. Wingate's opinion should
 27 have controlled. Tr. 12 at 4-5. While the Court agrees the issue could have been
 28 raised with more clarity, Plaintiff's Motion contains sufficient assertions for the

1 Court to review the weight the ALJ provided Dr. Wingate's opinion.

2 Dr. Wingate examined Plaintiff twice for DSHS, on January 7, 2010, and
3 August 2, 2010. In the January 7, 2010, evaluation, Dr. Wingate concluded that
4 Plaintiff had moderate limitations in his abilities to exercise judgement and make
5 decisions; to relate appropriately to co-workers and supervisors; to interact
6 appropriately in public contacts; to respond appropriately to and tolerate the
7 pressures and expectations of a normal work setting; and to maintain appropriate
8 behavior in a work setting. Tr. 418. Dr. Wingate went on to state that she
9 expected the recommended mental health intervention, i.e., medication
10 management, to restore Plaintiff's ability to work for pay in a regular and
11 predictable manner because he had responded well to treatment in the past. Tr.
12 419. She expected the functional limitations set forth above to last from six
13 months to one year. *Id.*

14 In the August 2, 2010, evaluation, Dr. Wingate opined that Plaintiff would
15 have marked limitations in his abilities to relate appropriately to co-workers and
16 supervisors; to interact appropriately in public contacts; to respond appropriately to
17 and tolerate the pressures and expectations of a normal work setting; and to
18 maintain appropriate behavior in a work setting. Tr. 428. Additionally, Dr.
19 Wingate gave Plaintiff a moderate limitation in the abilities to understand,
20 remember, and follow complex (more than two step) instructions; to perform
21 routine tasks; and to care for self, including personal hygiene and appearance. *Id.*
22 Dr. Wingate concluded that mental health intervention would not restore Plaintiff's
23 ability to work for pay in a regular and predictable manner. Tr. 429. She further
24 concluded that Plaintiff's prognosis was guarded, noting that his anxiety and
25 psychotic symptoms had continued even with mental health treatment. Tr. 429.

26 In the August 2, 2010 examination report, Dr. Wingate noted that Plaintiff
27 was taking psychiatric medication prescribed by Dr. Jennings, including Tegretol,
28 Seroquel, and Zoloft. Tr. 424. Dr. Jennings' records showed that Plaintiff was

1 filling his prescriptions. Tr. 474.

2 The ALJ gave the opinion of Dr. Wingate “some weight to the extent it is
3 consistent with Dr. Martin’s opinion,” noting that Dr. Wingate’s opinion was based
4 on claimant’s condition without proper medication. Tr. 31.

5 The record does not contain the opinion of a treating psychologist and Dr.
6 Wingate is an examining psychologist. Therefore, the ALJ is required to provide
7 clear and convincing reasons for rejecting Dr. Wingate’s opinion if it is
8 uncontradicted and specific and legitimate reasons for rejecting her opinion if it is
9 contradicted. The sole reason the ALJ provided for not giving Dr. Wingate’s
10 opinion controlling weight, that it was based on claimant’s condition without
11 proper medication, is not supported by the record.

12 The first time Dr. Wingate examined Plaintiff, he was not receiving mental
13 health treatment, including medication. Tr. 419. Therefore, for the January 7,
14 2010, evaluation, the ALJ’s statement that the opinion was based on Plaintiff’s
15 condition without proper medication is supported by the record. But, after seven
16 months of treatment, Dr. Wingate reexamined Plaintiff and opined that his
17 limitations had worsened and continued treatment would likely not result in
18 recovery. Tr. 429. Therefore, the ALJ’s reason for rejecting Dr. Wingate’s August
19 2, 2010, opinion, that it is based on Plaintiff’s condition without proper
20 medication, is not supported by substantial evidence. As such, it can neither be
21 clear and convincing nor specific and legitimate.

22 Accordingly, the Court finds the ALJ failed to properly consider the weight
23 given to Dr. Wingate’s opinion. Therefore, this matter must be remanded for
24 additional proceedings for the ALJ to properly assess Dr. Wingate’s August 2,
25 2010, opinion.

26 **2. Dr. Martin**

27 Dr. Martin testified at the November 7, 2012, hearing that she had never
28 treated or examined Plaintiff and had reviewed the medical records through Exhibit

1 13F. Tr. 62-63. This makes Dr. Martin a nonexamining psychologist.

2 The ALJ gave Dr. Martin's opinion "significant weight because it is from an
3 acceptable medical source who was able to evaluate all of the evidence." Tr. 29.

4 As discussed below, the record is ambiguous regarding the existence of
5 additional records pertaining to the relevant time period. Therefore, upon remand,
6 the ALJ will reconsider the weight given to Dr. Martin's opinion in light of a fully
7 developed record.

8 **3. Dr. Covell**

9 Dr. Covell completed a consultative examination on December 13, 2010.
10 Tr. 482-491. Dr. Covell opined that Plaintiff was potentially a malingerer with no
11 limitations in the ability to understand, recall, or follow through on simple or
12 complex instructions. Tr. 489. Dr. Covell did conclude that Plaintiff had
13 occasional limitations in concentration, pace and/or persistence, noting he can
14 work adequately with the supervisors and at least a few co-workers, but may have
15 difficulty in positions demanding routine, significant interactions with the public.
16 *Id.*

17 The ALJ found Plaintiff more limited than did Dr. Covell, concluding that
18 Dr. Covell's opinion regarding the Plaintiff's ability to work in a production pace
19 environment and function socially "is consistent with the evidence." Tr. 30.
20 However, the ALJ accorded Dr. Covell's opinion regarding Plaintiff's ability to
21 understand, remember, and carry out complex instructions "little weight" because
22 "the record documents the claimant's difficulties with concentration and
23 completing tasks." *Id.*

24 Considering the case is to be remanded, the ALJ will reevaluate Dr. Covell's
25 opinion in light of the other medical opinions and a fully developed record.

26 **B. Credibility**

27 Plaintiff argues that his testimony should be given "substantial weight"
28 inferring that the ALJ erred in his credibility determination. ECF No. 12 at 6.

1 It is generally the province of the ALJ to make credibility determinations,
2 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
3 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
4 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
5 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d
6 1273, 1281 (9th Cir. 1996).

7 The ALJ found the Plaintiff's statements as to "intensity, persistence and
8 limiting effects of [his] symptoms" to be "not credible to the extent they are
9 inconsistent" with the RFC. Tr. 27. The ALJ gave two reasons for why he found
10 Plaintiff to be less than fully credible: (1) because "his psychiatric testing had
11 scores suggesting malingering mental illness"; and (2) he provided inconsistent
12 statements about his substance use and other conditions. Tr. 28.

13 **1. Malingering**

14 The ALJ concluded that Plaintiff's score on the Miller Forensic Assessment
15 of Symptoms Test (M-FAST) along with his history of atypical hallucinations
16 support the finding that he is malingering. Tr. 28. In December of 2010, Plaintiff
17 completed the M-FAST with a score of nine, which Dr. Covell notes is
18 "significantly elevated, indicating that he may be malingering mental illness." Tr.
19 489.

20 The ALJ's finding of malingering is sufficient to support an adverse
21 credibility determination under Ninth Circuit jurisprudence. *See Benton v.*
22 *Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003); *see also, e.g., LaGrand v.*
23 *Commissioner Social Sec. Admin.* 379 F. App'x 555, 556 (9th Cir. 2010) (now
24 citable for its persuasive value per Ninth Circuit Rule 36-3) (citing *Benton* for the
25 proposition that "[t]he ALJ was entitled to reject LaGrand's testimony because
26 there was evidence of malingering"); *Flores v. Commissioner of Social Security*,
27 237 F. App'x 251, 252-253 (9th Cir. 2007) (citing *Benson* for the proposition that
28 "an ALJ may reject a claimant's subjective pain testimony if the record contains

1 affirmative evidence of malingering”); *Lira v. Astrue*, 2011 WL 1743308, at *2
2 (C.D. Cal. 2011) (“A finding of malingering is sufficient to support an adverse
3 credibility determination.”); *Robinson v. Michael Astrue*, 2011 WL 1261187, at
4 *11 (D. Or. 2011) (“Evidence of malingering, however, by itself, is enough to
5 discredit a claimant.”).

6 Here, the ALJ cites to Dr. Covell’s conclusion that Plaintiff may be a
7 malingerer and Plaintiff’s atypical hallucinations at Exhibit 8F at 16-17 as
8 affirmative evidence of malingering. Tr. 28. Dr. Covell’s report does suggest that
9 Plaintiff is malingering, but falls short of an actual positive diagnosis, stating that
10 an additional assessment “appears warranted to rule in/out diagnosis of
11 malingering.” Tr. 489. Furthermore, the records cited as Exhibit 8F at 16-17 do
12 not support the ALJ’s conclusion that Plaintiff experienced atypical hallucinations.
13 Instead, the records speak of “atypical antipsychotic and psychotherapy” as
14 treatment for Plaintiff’s mental health impairments. Tr. 513-514. But, a review of
15 the record as a whole does indicate some inconsistent statements by Plaintiff
16 regarding his visual and audio hallucinations, which can be considered feigning:
17 In January of 2010, Plaintiff tells Dr. Wingate that he experiences audio
18 hallucinations in the form of voices that tell him to harm himself and visual
19 hallucinations in the form of a “male figure in a flash,” Tr. 415; in March of 2010,
20 Plaintiff tells Sarah Dailey he experiences audio hallucinations in the form of
21 voices telling him to hurt himself and visual hallucinations in the form of a
22 “shadow guy,” Tr. 435; in August of 2010, he tells Dr. Wingate that he
23 experiences auditory hallucinations in the form of voices that tell him to harm
24 himself or hurt others and visual hallucinations in the form of “words that he is
25 thinking, but the man that he used to see rarely ‘comes around,’” Tr. 425; in
26 December of 2010, Plaintiff tells Dr. Colvin that he experiences audio
27 hallucinations in the form of a voice in his head that tells him to kill people and the
28 visual hallucinations are in the form of a black shadow creature “that has been

1 haunting me forever,” Tr. 485-486; in January of 2012, Plaintiff tells Jennifer
2 Morrison, M.S., that he began experiencing audio hallucinations in 2007 as a
3 screaming women before he fell asleep and that he experiences visual
4 hallucinations in the form of a little girl, Tr. 568-569; and at the November 7,
5 2012, hearing Plaintiff testified that his visual hallucinations were that of a little
6 girl. Tr. 103.

7 Although the ALJ’s conclusion that the file contains affirmative evidence of
8 malingering is not supported by an affirmative diagnosis and her assertion that
9 Plaintiff experiences atypical hallucinations, is not an accurate reflection of the
10 record, the record may contain substantial evidence to find Plaintiff malingering.
11 Accordingly, this issue shall be considered on remand. The ALJ is to review the
12 record as a whole and determine if substantial evidence supports a finding of
13 malingering.

14 **2. Inconsistent statements**

15 In addition to malingering, the ALJ found that Plaintiff had provided
16 inconsistent statements about his substance use, his right knee pain, and why he
17 presented for treatment. Tr. 28. Absent affirmative evidence of malingering, the
18 ALJ’s reasons for rejecting the claimant’s testimony must be “specific, clear and
19 convincing.” *Smolen*, 80 F.3d at 1281. General findings are insufficient; rather,
20 the ALJ must identify what testimony is not credible and what evidence
21 undermines the claimant’s complaints. *Reddick v. Chater*, 157 F.3d 715, 722 (9th
22 Cir. 1998). In determining a claimant’s credibility, the ALJ may consider
23 “ordinary techniques of credibility evaluation, such as the claimant’s reputation for
24 lying, prior inconsistent statements . . . and other testimony by the claimant that
25 appears less than candid.” *Smolen*, 80 F.3d at 1284.

26 First, the ALJ noted that Plaintiff was inconsistent in his reported substance
27 use history. An ALJ may properly consider evidence of a claimant’s substance use
28 in assessing credibility. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002)

1 (ALJ's finding that claimant was not a reliable historian regarding drug and
2 alcohol usage supports negative credibility determination); *Verduzco v. Apfel*, 188
3 F.3d 1087, 1090 (9th Cir. 1999) (conflicting or inconsistent testimony concerning
4 alcohol or drug use can contribute to an adverse credibility finding).

5 To support the determination that Plaintiff provided inconsistent statements
6 regarding his substance use, the ALJ cited the following reports: On June 11,
7 2009, Plaintiff reported that he quit drinking six to seven months prior and he used
8 to do cocaine, Tr. 391; on January 7, 2010, Plaintiff reported he stopped drinking
9 in 2008 and he last used cannabis and cocaine on January 17, 2009, Tr. 420; on
10 December 23, 2010, Plaintiff reported that he drank daily until about three years
11 ago and admitted he was currently drinking, his last use of cocaine was January of
12 2009, he used marijuana daily until the age of 30 (there is no mention of a date of
13 last use), he last used acid in 1992 or 1993, he last used mushrooms at about age
14 19, he last used methamphetamines at about age 30, and he last used LSD at age
15 18, Tr. 486; on November 15, 2011, Plaintiff reported he was currently drinking
16 and he had a history of using cocaine, methamphetamine, and crack, but had
17 stopped taking drugs on January 9, 2009, Tr. 619; and on February 6, 2012,
18 Plaintiff stated he was currently drinking and using marijuana. Tr. 562.

19 The above citations to the record are actually not inconsistent. Plaintiff
20 consistently states he stopped drinking in 2008 and then he started drinking again
21 later on. Plaintiff stopped smoking marijuana in 2009, but started smoking again.
22 Plaintiff consistently reported no use of other substances after January of 2009.

23 The ALJ's determination is not supported by substantial evidence.
24 Therefore, this is not a clear and convincing reason to reject Plaintiff's credibility.

25 Second, the ALJ concluded that despite allegations of knee pain, Plaintiff
26 reported his right knee was "great" with no issues in June of 2011. Tr. 28. A
27 review of the record as a whole reveals that Plaintiff made several statements
28 regarding pain in his right knee prior to June 23, 2011. Tr. 319, 477, 522. Plaintiff

1 had surgery on the right knee on May 11, 2011. Tr. 669. At a post-op follow up
2 on May 24, 2011, Plaintiff stated that he was experiencing some aching in the front
3 of the knee. *Id.* At the post-op follow up on June 23, 2011, he reported that his
4 right knee was “great” and had no issues. Tr. 674. At the November 7, 2012,
5 hearing, Plaintiff testified that he experienced pain in both his knees. Tr. 97.

6 Here, it is unclear if the ALJ is finding that the June 2011 statement is
7 inconsistent with all the reports of knee pain throughout the record or just the
8 testimony at the hearing that the knee pain continued despite the success of the
9 surgery. *See Reddick*, 157 F.3d at 722 (general findings are insufficient; rather, the
10 ALJ must identify what testimony is not credible and what evidence undermines
11 the claimant’s complaints). Therefore, this is not a specific, clear and convincing
12 reason to find Plaintiff less than fully credible.

13 Finally, the ALJ noted that Plaintiff “reported to his behavioral health
14 assessor in January 21012 (*sic*) that ‘the state is asking [him] to be here.’” Tr. 28.
15 It is unclear why the ALJ concluded this supported an adverse credibility finding.
16 Again, the ALJ failed to identify what testimony was undermined by this report as
17 required by *Reddick*. Therefore, this too is not a specific, clear and convincing
18 reason to find Plaintiff less than fully credible.

19 In conclusion, the ALJ failed to set forth a specific, clear and convincing
20 reason for finding the Plaintiff less than fully credible. Therefore, the ALJ shall
21 reassess credibility on remand.

22 **C. RFC**

23 Plaintiff makes two arguments pertaining to the ALJ’s formation of the
24 RFC: (1) based on the testimony of Dr. Francis at the hearing, the RFC should be
25 limited to sedentary work; and (2) the ALJ failed to include the limitations from
26 Dr. Wingate’s opinion in the RFC. ECF No. 12 at 7-8.

27 A claimant’s RFC is “the most [a claimant] can still do despite [his]
28 limitations.” 20 C.F.R. § 416.945(a); *see also* 20 C.F.R. Part 404, Subpart P,

1 Appendix 2, § 200.00(c) (defining RFC as the “maximum degree to which the
2 individual retains the capacity for sustained performance of the physical-mental
3 requirements of jobs”). In formulating a RFC, the ALJ weighs medical and other
4 source opinions and also considers the claimant’s credibility and ability to perform
5 daily activities. *See, e.g., Bray v. Comm’r, Soc. Sec. Admin.*, 554 F.3d 1219, 1226
6 (9th Cir. 2009).

7 As to Plaintiff’s first assertion, that his RFC should be limited to sedentary
8 work, there is no error. The ALJ found Plaintiff was limited to a less than full
9 range of sedentary work. Tr. 26. Therefore, Plaintiff’s argument is moot.

10 As to Plaintiff’s second assertion, that the ALJ failed to include the
11 limitations opined by Dr. Wingate, the ALJ is instructed to readdress the RFC on
12 remand in light of the weight given to the medical opinions in the record and a new
13 credibility determination.

14 **D. Development of the Record**

15 Plaintiff asserts there was medical evidence missing from the record. ECF
16 No. 12 at 7-8.

17 The ALJ has “a special duty to fully and fairly develop the record and to
18 assure that the claimant’s interests are considered.” *Smolen*, 80 F.3d at 1288. This
19 duty exists even when the claimant is represented by counsel. *Brown v. Heckler*,
20 713 F.2d 441, 443 (9th Cir. 1983). Despite this duty to develop the record, it
21 remains the claimant’s burden to prove that he is disabled. 42 U.S.C. §
22 423(d)(5)(A); 20 C.F.R. §§ 404.1512(a), 416.912(a). “An ALJ’s duty to develop
23 the record . . . is triggered only when there is ambiguous evidence or when the
24 record is inadequate to allow for proper evaluation of the evidence.” *Mayes v.*
25 *Massanari*, 276 F.3d 453, 459-460 (9th Cir. 2001). “In cases of mental
26 impairments, this duty is especially important.” *DeLorme v. Sullivan*, 924 F.2d
27 841, 849 (9th Cir.1990); *see also* 20 C.F.R. § 404.944 (stating that the ALJ may
28 continue the hearing if she believes material evidence is missing, and may reopen

1 the hearing at any time prior to mailing a notice of decision to receive new and
2 material evidence); 20 C.F.R. § 416.1450(d) (providing that the ALJ may issue
3 subpoenas on her own initiative or at the request of a party).

4 At the hearing, Dr. Martin questioned Plaintiff about the absence of records
5 from hospitalizations following his 2008 and 2009 suicide attempts and missing
6 counseling records. Tr. 67-69. Dr. Martin testified that “it would be helpful to
7 have those records. . . . But we can go ahead here.” Tr. 69.

8 Defendant asserts that all the missing records are from outside the relevant
9 time period and are, therefore, outside the ALJ’s duty to review. ECF 15 at 4. The
10 Plaintiff testified to missing records pertaining to the relevant time period, since
11 June 1, 2009, discussing a hospitalization and counseling records in 2009 that are
12 absent from the record. Tr. 67-68.

13 Considering the case is remanded to the ALJ for further proceedings, the
14 ALJ is instructed to procure the necessary, relevant treatment notes.

15 REMEDY

16 Plaintiff argues that the ALJ’s decision should be reversed and remanded for
17 an immediate award of benefits. EFC No. 12 at 8. The decision whether to
18 remand for further proceedings or reverse and award benefits is within the
19 discretion of the district court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir.
20 1989). The Court may award benefits if the record is fully developed and further
21 administrative proceedings would serve no useful purpose. *Smolen*, 80 F.3d at
22 1292. Remand for additional proceedings is appropriate when additional
23 proceedings could remedy defects. *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th
24 Cir.1989). In this case, it is not clear from the record that the ALJ would be
25 required to find Plaintiff disabled if the record was fully developed and all the
26 evidence were properly evaluated. Further proceedings are necessary for a proper
27 determination to be made.

28 On remand, the ALJ shall determine Plaintiff’s credibility regarding his

1 symptom reporting, and reassess Plaintiff's RFC, taking into considering the
2 opinions of Dr. Wingate and all other medical evidence of record relevant to
3 Plaintiff's claim for disability benefits. The ALJ shall develop the record further
4 by gathering all outstanding relevant treatment records and, if warranted, by
5 eliciting medical expert testimony to assist the ALJ in formulating a new RFC
6 determination. The ALJ shall obtain testimony from a vocational expert and take
7 into consideration any other evidence or testimony relevant to Plaintiff's disability
8 claim.

9 CONCLUSION

10 Accordingly, **IT IS ORDERED:**

11 1. Defendant's Motion for Summary Judgment, **ECF No. 15**, is
12 **DENIED**.

13 2. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is
14 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
15 additional proceedings consistent with this Order.

16 3. Application for attorney fees may be filed by separate motion.

17 The District Court Executive is directed to file this Order and provide a copy
18 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
19 **and the file shall be CLOSED.**

20 DATED November 27, 2015.



A handwritten signature in dark ink, appearing to be "M" or "Rodgers", is written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE